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Unemployment Compensation: The Ohio Supreme Court Rules on the Use of the Status Quo Test for Determining When a Work Stoppage Is Due to a Lockout

Adam Seth Levy
University of Dayton

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UNEMPLOYMENT COMPENSATION: THE OHIO SUPREME COURT RULES ON THE USE OF THE STATUS QUO TEST FOR DETERMINING WHEN A WORK STOPPAGE IS DUE TO A LOCKOUT—*Bays v. Shenango Co.*, 53 Ohio St. 3d 132, 559 N.E.2d 740 (1990).

I. INTRODUCTION

Whether an unemployed individual is entitled to unemployment compensation benefits is an issue of great concern for both the worker and the employer.[1] When a work stoppage ensues, payment of unemployment compensation benefits to an idled worker depends upon an administrative or judicial interpretation of the state's labor dispute disqualification provision. Under Ohio's labor dispute disqualification provision, a worker is ineligible for unemployment benefits if his unemployment is "due to a labor dispute other than a lockout."[2] Ohio's unemployment compensation statute, however, is silent with respect to what constitutes a lockout. In *Bays v. Shenango Company*,[3] the Ohio Supreme Court ruled that the status quo test, created by the Pennsylvania Supreme Court in *Erie Forge & Steel Corporation v. Unemployment Compensation Board of Review* (Vrotney Unemployment Compensation Case)[4] and first adopted in Ohio by the Cuyahoga County Court of Appeals in *Oriti v. Board of Review*,[5] is the proper standard by which to determine whether a work stoppage is due to a labor dispute other than a lockout.

The concept of status quo encourages parties to a pre-existing collective bargaining agreement to continue functioning under the terms and conditions of that agreement, following its expiration, when no new agreement has been formed. During the interim period, the status quo standard encourages the parties to continue negotiations in good faith

1. In the case of the worker who is ineligible for benefits, it is not difficult to imagine the terrifying dangers posed by unemployment. Yet, the employer is not without his own concerns. Employers indirectly bear the burden of paying for their employees' unemployment benefits through unemployment insurance premiums. Comment, *Unemployment Benefits Laid-Off Workers and Labor Disputes: The Unemployment Benefit Conflict*, 19 WILLAMETTE L. REV. 737, 737 n.1 (1983).

2. OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (Anderson 1991). Ohio's labor dispute disqualification provision is contained in Ohio's Unemployment Compensation Act. *Id.* §§ 4141.01-.99. For a general discussion of Ohio's Unemployment Compensation Act, *see infra* notes 8-41 and accompanying text. For a background discussion concerning court interpretations of Ohio's labor dispute disqualification provision, *see infra* notes 81-141 and accompanying text.

3. 53 Ohio St. 3d 132, 559 N.E.2d 740 (1990).

4. 400 Pa. 440, 163 A.2d 91 (1960).

5. 7 Ohio App. 3d 311, 455 N.E.2d 720 (1983).

for a new agreement. In *Bays*, the court held that an offer made by a union to continue working under the terms of a pre-existing agreement, including cost-of-living adjustments, for the period of one year, was an offer to maintain the status quo.[6] Because the union offered to maintain the status quo, the court ruled that a subsequent work stoppage was due to a lockout, thereby entitling employees to unemployment compensation benefits.[7]

This note examines and analyzes the *Bays* decision. It determines that the *Bays* court failed to properly apply Pennsylvania precedent regarding the status quo test without explaining why the court chose to deviate from settled Pennsylvania case law. The first part of this note briefly discusses Ohio's Unemployment Compensation Act. The note then specifically focuses upon the labor dispute disqualification provisions contained in both the Pennsylvania and Ohio acts. Additionally, it sets forth Pennsylvania's and Ohio's treatment of their disqualification provisions.

The second portion of this note centers on the *Bays* decision itself. This note argues that the *Bays* court appropriately validated the status quo test for use in Ohio unemployment compensation disputes, but erroneously decided that: (1) the concept of status quo includes cost-of-living adjustments; (2) a one year extension of the terms and conditions of a pre-existing agreement represents a reasonable period under the concept of status quo; and (3) the status quo test requires an analysis of the employer's offer to maintain the status quo. This note asserts that the *Bays* decision represents an unexplained deviation from Pennsylvania precedent and posits that the decision will cause confusion in the area of unemployment compensation, thereby creating more litigation over issues within this area of the law. The Ohio courts should be encouraged to tailor the concept of status quo to fit the needs of Ohio. This note recommends, however, that future decisions breaking from Pennsylvania precedent regarding the status quo test should set forth better explanations concerning the need to deviate from settled Pennsylvania case law. Such explanations would provide more certainty in the law and would furnish less incentive for costly litigation.

6. *Bays*, 53 Ohio St. 3d at 136, 559 N.E.2d at 744.
7. *Id.*

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II. Background

A. *Basic Structure of Ohio's Unemployment Compensation Act*

1. General Coverage

The Ohio Unemployment Compensation Act[8] (the Act), in general, covers employers: (1) with at least one employee engaging in employment covered by the Act for any portion of a day in each of twenty weeks in a calendar year whether or not the same employee works for that period, or (2) who paid wages to employees in employment covered by the Act equaling or in excess of $1,500 during any calendar quarter in the calendar year.[9] "Employment" is defined as "[s]ervices performed for wages under any contract of hire, written or oral, express or implied."[10] Employment covered by the Act includes services performed by an individual for an employer within the state.[11]

The rate at which an employer must contribute to the unemployment compensation fund depends, to some degree, upon how often its employees have been entitled to benefits.[12] An employer pays an average contribution rate until that employer has benefits charged to it's account for four consecutive calendar quarters by June 30 of the "contribution period."[13] At that time, the employer graduates to a higher level of contribution.[14] Employers, therefore, have a direct interest in contesting their employees' claims for benefits.[15]

2. Benefits

In order to obtain benefits, claimants must show that they are unemployed through no fault of their own,[16] that they worked for a period

8. Ohio Rev. Code Ann. §§ 4141.01-.99 (Anderson 1991). For a thorough discussion of Ohio's Unemployment Compensation Act, see Klein, *Unemployment Insurance in Ohio*, 11 U. Tol. L. Rev. 27 (1979).

9. Ohio Rev. Code Ann. §§ 4141.01(A)(1)(a), (b). Nonprofit organizations are also covered if they had at least four employees for twenty calendar weeks in a calendar year. *Id.* § 4141.01(A)(1)(a).

10. *Id.* § 4141.01(B)(1)(a).

11. *Id.* § 4141.01(B)(2). Special provisions exist for many types of employment such as domestic services, agricultural services, government bodies, and school employees. *See id.* Certain types of employment are specifically excluded from the Act's reach as well. *See id.* § 4141.01(B)(3).

12. *Id.* § 4141.25(B).

13. *Id.* " 'Contribution period' means the calendar year beginning on the first day of January of any year." *Id.* § 4141.01(U).

14. *Id.* §§ 4141.25(B),(C).

15. Klein, *supra* note 8, at 32.

16. For a discussion of this proposition and a list of court decisions stating that the major purpose of the Unemployment Compensation Act is to alleviate the hardships of unemployment for those who have become unemployed through no fault of their own, see infra notes 180-84 and accompanying text.

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long enough to claim benefits under the Act, and that they are able, available, and actively seeking work in the locality where they were employed prior to being laid off; or, if they have left that locality, in a locality where suitable work is normally performed.[17] Furthermore, claimants do not become eligible for benefits until they have served a waiting period of one week.[18] Once determined eligible, the measure of a claimant's benefits is the number of weeks that the claimant has worked and the claimant's gross wages earned during the "base period."[19]

To receive benefits during the "benefit year," claimants must file a claim for each separate week of unemployment.[20] In addition, claimants must comply with a long list of statutory requirements including the requirement that claimants may not be unemployed due to a labor dispute other than a lockout.[21] Claimants, however, may obtain benefits if they demonstrate that they are not directly interested in the labor dispute.[22] Claimants also may obtain benefits if they can show that their employer was not involved in the labor dispute, but had his place of business at the location where another employer was engaged in a labor dispute, so long as the former employer is not wholly owned by an employer who is involved in the labor dispute.[23]

3. Benefit Determination and Procedure for Appeal

A claimant begins the procedure for determining benefits by filing an application for benefits with the local Ohio Bureau of Employment Services (OBES).[24] OBES will then send the claimant information explaining the claimant's rights and the appeal process.[25] OBES will also send notice to the employer that a filing has been made and will inform the employer of its right to attend a fact finding interview prior to any

17. OHIO REV. CODE ANN. § 4141.29(A)(4)(a).

18. *Id.* § 4141.29(B).

19. *Id.* § 4141.01(Q). " 'Base period' means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year . . . ." *Id.*

20. *Id.* § 4141.29(A).

21. *Id.* § 4141.29(D)(1)(a). For a background discussion concerning court interpretations of Ohio's labor dispute disqualification provision, see *infra* notes 81-141 and accompanying text. Additional bases upon which claimants will be denied benefits include: unemployment due to disciplinary reasons, quitting without just cause, refusing to accept an offer of suitable work without good cause, quitting for domestic reasons, obtaining benefits through falsehood or misrepresentation, unemployment due to commitment in a penal institution, and unemployment because of dishonesty in connection with prior work. *Id.* §§ 4141.29(D)(1)-(2).

22. *Id.* § 4141.29(D)(1)(a)(i).

23. *Id.* § 4141.29(D)(1)(a)(ii).

24. *Id.* § 4141.28(A); *see* Klein, *supra* note 8, at 46.

25. OHIO REV. CODE ANN. § 4141.28(B).

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determination of benefits.[26] Following the interviewing process, all interested parties will receive a Determination of Application for Benefit Rights (Determination).[27] If benefits are allowed, these Determinations will contain a statement of the claimant's average weekly wage, the weekly benefit amount, the total benefits payable, and the beginning of the benefit year.[28] In addition, an employer's determination will contain a statement of the total amount of benefits that may be charged to its account.[29]

Any interested party who is notified of an OBES Determination of benefit rights may apply for a reconsideration.[30] Upon a request for reconsideration, the Administrator of OBES may refer the matter to the Board of Review as an appeal if he decides that the matter necessitates a hearing.[31] This occurs infrequently, however, as most reconsiderations are ruled upon by the Reconsideration Branch of the OBES.[32]

Any interested party may appeal the Administrator's decision on reconsideration to the Board of Review.[33] At the administrative level, there are two stages of appeal.[34] Initially, a referee hears and decides all appeals.[35] Following this, an appellant may file an application to institute a further appeal in which the Board, if it chooses to allow the further appeal, will review the decision of the referee and must either affirm, reverse, or modify the decision.[36]

Any interested party may appeal from the decision of the Board to the court of common pleas.[37] The appeal is heard upon the transcript of

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26. *Id.*

27. *Id.* § 4141.28(C) Interested parties include the claimant and any employer to whom notices must be sent. *See id.* §§ 4141.01(I), 4141.28(C).

28. Klein, *supra* note 8, at 46-47.

29. *Id.;* OHIO REV. CODE ANN. § 4141.28(C).

30. *Id.* § 4141.28(G)(1). Applications for reconsideration must be in writing and must be filed within twenty-one calendar days after notice was mailed to the interested party's last known post-office address. *Id.*

31. *Id.* § 4141.28(G)(2); *see* Klein, *supra* note 8, at 48.

32. Klein, *supra* note 8, at 48.

33. OHIO REV. CODE ANN. § 4141.28(H). Appeals must be filed within twenty-one calendar days following the mailing of the decision on reconsideration to the appellant. *Id.* The decision is final if the appellant fails to file in a timely manner. *Id.*

34. Klein, *supra* note 8, at 51; *see* OHIO REV. CODE ANN. §§ 4141.28(I), (J), (M).

35. Klein, *supra* note 8, at 51.

36. OHIO REV. CODE ANN. § 4141.28(M).

37. *Id.* § 4141.28(O). Appeals must be made within thirty days after notice of the decision of the Board is mailed to the last known post-office address of all interested parties. *Id.* An appeal must be taken in the county where the appellant, if an employee, is a resident or was last employed, or, if an employer, is a resident or has its principle place of business in the state. *Id.* A Notice of Appeal must be filed with the Clerk of the court of common pleas, with the Board, and must be sent to all interested parties by registered mail. *Id.* The Board may, by petition, be made a party to such appeal. *Id.*

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the record as certified by the Board.[38] The court can reverse and vacate the decision of the Board, or modify such decision and enter final judgment only if the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence.[39] Otherwise, the court must affirm the decision.[40] As in civil cases, any interested party may appeal the decision of the court.[41]

B. *Interpretation of Labor Dispute Disqualification Provisions*

One area of benefit determination which has been the subject of judicial attention is the labor dispute disqualification provision. Because the Ohio Supreme Court's decision in *Bays v. Shenango Co.*[42] relied on Pennsylvania case law, it is necessary to examine the labor dispute disqualification provisions of both Pennsylvania's[43] and Ohio's[44] unemployment compensation acts, as well as the two states' pertinent court decisions regarding these provisions. The Pennsylvania and Ohio unemployment compensation acts are textually similar and historically, the courts of these states have used similar methods to determine whether idled employees are entitled to unemployment benefits.[45] Indeed, the *Bays* decision represents the most recent example of this proposition. Further, both states' acts have similar purposes and goals.[46] Thus, an examination of both states' unemployment statutes and their courts' decisions is helpful in understanding why the *Bays* court chose to adopt Pennsylvania's "status quo" test, whether the *Bays* court should have adopted the standard, and whether the *Bays* court applied that standard correctly.

1. Pennsylvania

Under section 802(d) of the Pennsylvania Unemployment Compensation Law,[47] a claimant is ineligible for unemployment compensa-

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38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. 53 Ohio St. 3d 132, 559 N.E.2d 740 (1990).
43. 43 PA. CONS. STAT. ANN. § 802(d) (Purdon 1964).
44. OHIO REV. CODE ANN. § 4141.28(D)(1)(a).
45. *Compare* Leto Unemployment Compensation Case, 176 Pa. Super. 9, 106 A.2d 652 (1954) (applying final cause test to determine that a work stoppage was due to a lockout) *and* Vrotney Unemployment Compensation Case, 400 Pa. 440, 163 A.2d 91 (1960) (creating status quo test for determining whether work stoppages are due to lockouts or strikes) *with* Alden v. United States Indus. Chems. Co., 9 Ohio App. 2d 5, 222 N.E.2d 785 (1966) (impliedly using final cause test to determine that a work stoppage was due to a lockout) *and* Oriti v. Unemployment Compensation Bd. of Review, 7 Ohio App. 3d 311, 455 N.E.2d 720 (1983) (adopting *Vrotney* status quo test). For discussions of these cases, see *infra* notes 52-65, 85-91, 120-41 and accompanying text.

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46. *See infra* notes 185-91 and accompanying text.
47. 43 PA. CONS. STAT. ANN. §§ 751-881 (Purdon 1964).

tion benefits during a work stoppage unless the work stoppage is the result of a lockout.[48] The Pennsylvania statute, however, does not define the word "lockout."[49] An early test adopted by the Pennsylvania courts to determine whether a work stoppage was the result of a lockout was the "final cause" test.[50] Under this test, the courts would impose responsibility or fault upon the party whose actions constituted the final cause of the work stoppage.[51]

In *Erie Forge and Steel Corp. v. Unemployment Compensation Board of Review* (Vrotney Unemployment Compensation Case),[52] the Pennsylvania Supreme Court replaced the "final cause" test with the "status quo" test to assign fault for a work stoppage and, thus, to determine whether a work stoppage is due to a lockout or a strike.[53] In *Vrotney*, the union and management were engaged in negotiations spanning over an extensive period.[54] The union asked for increases in

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48. Section 802(d) in pertinent part states: "An employee shall be ineligible for compensation for any week . . . (d)[i]n which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lock-out) at the factory, establishment or other premises at which he is or was last employed . . . . " 43 PA. CONS. STAT. ANN. § 802 (D) (PURDON 1964).

49. The Pennsylvania courts have defined a lockout as "an employer's withholding of work from his employees in order to gain a concession from them." Small Tube Products, Inc. v. Unemployment Compensation Bd. of Review (Irvin Unemployment Compensation Case), 198 Pa. Super. 308, 314-15, 181 A.2d 854, 858 (1962). Moreover, it has been identified as "the employer's counterpart of a strike." *Id.* A strike has been defined as "the act of quitting work done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer." Armour Leather Co. v. Unemployment Compensation Bd. of Rev., 192 Pa. Super. 190, 195, 159 A.2d 772, 775 (1960).

50. Note, *Employees May Collect Compensation During Contract Negotiations if Employer Imposes Changes in Status Quo that Are Beneficial to Employees*, 58 TEMP. L.Q. 473, 477 (1985).

51. *See id.* (citing Leto Unemployment Compensation Case, 176 Pa. Super. 9, 106 A.2d 652 (1954) (lockout occurred because employer's imposition of unilateral wage reductions during period between expiration of prior contract and adoption of new contract, after union had offered to continue working under prior contract terms, was final cause of the work stoppage); Hogan Unemployment Compensation Case, 169 Pa. Super. 554, 83 A.2d 386 (1951) (strike rather than lockout transpired because union members' refusal to work without a contract was final cause of work stoppage)); *see also* Comment, *Pennsylvania's Lockout Exception to the Labor Dispute Disqualification from Benefits: Federal Challenges and Issues*, 80 DICK. L. REV. 70, 74 (1975) (citing Morris v. Unemployment Compensation Bd. of Review, 169 Pa. Super. 564, 568, 83 A.2d 394, 397 (1951)).

For a discussion of the Ohio courts' use of the final cause test, *see infra* notes 85-97 and accompanying text.

52. 400 Pa. 440, 163 A.2d 91 (1960) [hereinafter *Vrotney*].

53. Note, *Pennsylvania Abandons Prior Application of the Reinstatement of Status Quo Standard in Work Stoppages Caused by Labor Disputes*, 60 TEMP. L.Q. 503, 511 (1987); *see* Note, *supra* note 50, at 477.

54. *Vrotney*, 400 Pa. at 442, 163 A.2d at 92.

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wages and fringe benefits.[55] Management made a counter-offer involving smaller increases in wages and fringe benefits than the union desired.[56] In addition, management's offer was contingent upon the abolition of premiums and tonnage systems.[57] The union refused management's offer and informed management that upon the expiration of the present collective bargaining agreement, under which both parties were working, a strike would take place.[58]

On the day that the existing agreement was due to expire, the union offered to continue working under the terms of the existing agreement for an indefinite period with a five day cancellation clause by either party to allow for additional time during which to continue negotiations.[59] Management refused the union's offer to extend the existing agreement and informed the union that future employment would only be available under the terms of management's final proposal.[60] The union again refused to accept management's proposal, and the employees continued to work until the agreement expired.[61] Following expiration of the agreement, the employer made employment available, but only under its new conditions.[62]

For the purpose of determining whether the employees were entitled to unemployment benefits, the court placed responsibility for the work stoppage on the party who failed to continue the working relationship for a reasonable period under the terms of the previous agreement while negotiations for a new agreement continued.[63] Thus, the employees were eligible to receive unemployment benefits due to management's rejection of the union's good faith offer to maintain the status quo for a reasonable period.[64] The *Vrotney* court's rationale for adopt-

55. *Id.*
56. *Id.* at 443, 163 A.2d at 93.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 444-45, 163 A.2d at 93-94. The *Vrotney* court stated the test of responsibility for a work stoppage as follows:

> Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lock-out" and the disqualification for unemployment compensation benefits in the case of a "stoppage of work because of a labor dispute" does not qualify.

Id.

64. *Id.* 163 A.2d at 94.

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ing the status quo standard was based upon the need for parties to engage in the sensitive negotiating process in good faith and with the common purpose of continuing the employment relationship.[65]

Following the *Vrotney* decision, the Pennsylvania Supreme Court has clarified the status quo test. In *Philco Corporation v. Unemployment Compensation Board of Review,*[66] the court modified the status quo test by holding that when a work stoppage assumes the form of a strike, the burden is upon the employees to show that they either offered to maintain the status quo or that it would have been useless to do so.[67] In *Philco*, a collective bargaining agreement between the union and management was due to expire on Saturday, April 25, 1964.[68] The union and management had engaged in excess of twenty bargaining sessions which failed to yield any significant concessions.[69] In response to management's hard bargaining line, which the union perceived as a "no contract-no work" position, the union voted to stop working on April 27.[70] At no time did the union offer to maintain the status quo.[71] Although management also failed to offer a continuation of the terms of the pre-existing agreement, several management representatives testified that work was available on April 27.[72]

Based on these facts, the court concluded that as of April 25, the union may have been justified in believing that management would not open its doors without a new contract on the morning of April 27.[73] The union was not justified, however, in voting to strike thirty-six hours before management's actual decision to open or close on April 27.[74] According to the court, the union foreclosed all possibility for a last minute concession by voting to strike in advance.[75] Because the union failed to advance an offer to maintain the status quo, the court determined that the work stoppage was due to a strike.[76]

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65. *Id.* at 443-44, 163 A.2d at 93. For a quotation of the courts' rationale in *Vrotney*, see *infra* note 122 and accompanying text.

66. 430 Pa. 101, 242 A.2d 454 (1968).

67. *Id.* at 104, 242 A.2d at 455-56. The notion that employees need not prove that they offered to maintain the status quo if it would have been useless to do so is known as the "futility doctrine." *Id.*, 242 A.2d at 456 (citing Irvin Unemployment Compensation Case, 198 Pa. Super. 308, 181 A.2d 854 (1962) (union need not offer to maintain status quo if it appears that management would definitely not accept offer)).

68. *Id.* at 107, 242 A.2d at 456.

69. *Id.*, 242 A.2d at 457.

70. *Id.* at 107-08, 242 A.2d at 457.

71. *Id.*

72. *Id.*

73. *Id.* at 109, 242 A.2d at 458.

74. *Id.* at 110, 242 A.2d at 458-59.

75. *Id.*

76. *Id.* at 103-04, 242 A.2d at 455-56. As stated, there never was an offer to maintain the status quo in *Philco* and the court scrutinized the period between the expiration of the contract

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While the Pennsylvania courts will scrutinize the actions of the parties after an agreement expires, the courts refuse to consider the subjective motivations for work stoppages.[77] Moreover, even the slightest departure from the extended contract terms represents an alteration of the status quo.[78] Indeed, Pennsylvania decisions demonstrate a reluctance to depart from the objectivity of the *Vrotney* test which fosters predictability and clarity in determining who is at fault when a work stoppage occurs,[79] and further encourages continued employment during contract negotiations.[80]

2. Ohio

Akin to the labor dispute disqualification provision contained in the Pennsylvania Unemployment Compensation Law,[81] individuals in

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and the actual work stoppage, determining that the union's actions foreclosed any opportunity for last minute negotiations and concessions. Pennsylvania courts have been equally concerned with situations in which there has been an offer to maintain the status quo and contract negotiations continue. In these cases, the question is who first rejects that offer. *See, e.g.*, Borello v. Unemployment Compensation Bd. of Review, 490 Pa. 607, 613, 417 A.2d 205, 208-09 (1980) (practical approach to *Vrotney* test is determination of which party first refused working conditions of previous contract); *Philco* 430 Pa. at 103, 242 A.2d at 455 (test requires determination of which side first refused to maintain operations under the status quo after expiration of contract, but while negotiations continued).

77. *E.g.*, Unemployment Compensation Bd. of Review v. Sun Oil Co., 476 Pa. 589, 595, 383 A.2d 519, 522 (1978). *See also* Bokosky Unemployment Compensation Case, 206 Pa. Super. 96, 105, 211 A.2d 124, 128 (1965) (refusing to consider factors such as employer's profitability and economic difficulties in determining whether work stoppage constituted a strike or a lockout).

In Local 730 v. Unemployment Compensation Bd. of Review, 505 Pa. 480, 480 A.2d 1000 (1984), the court maintained its view on subjective factors. In *Local 730*, the employer's unilateral change in the status quo effected an increase in wages and fringe benefits. *Id.* at 485-86, 480 A.2d at 1003. The employer argued that because the new terms were more beneficial to the employees than the terms of the previous agreement, his actions should not have been considered an alteration of the status quo. *Id.* The court disagreed, arguing that the determination of what might be beneficial is an arduous task, and held that an alteration of the status quo need not necessarily result in a detriment to the other party. *Id.* at 486-87, 480 A.2d at 1003-04. According to the court, any examination of the subjective motivations for a work stoppage weakens the objectivity of the *Vrotney* test. *Id.* at 489-90, 480 A.2d at 1005.

78. Chichester School District v. Unemployment Compensation Bd. of Review, 53 Pa. Commw. 74, 77-78, 415 A.2d 997, 1000 (1980) (work stoppage constitutes lockout even though employer makes work available under substantially the same terms and conditions of the expired contract).

79. *Local 730*, 505 Pa. at 489-90, 480 A.2d at 1005. "[S]ubjective motivations for a work stoppage . . . undermine the clarity and relative predictability embodied in the standard set forth in our *Vrotney* and *Philco Corp.* decisions." *Id.* (quoting Unemployment Compensation Bd. v. Sun Oil, 476 Pa. 589, 595, 383 A.2d 519, 522).

80. *See, e.g.*, Fairview School Dist. v. Unemployment Compensation Bd. of Review, 499 Pa. 539, 546-47, 454 A.2d 517, 521 (1982) (underlying rationale of status quo test is that employer may continue operations and employees may continue working during the interim period); *Sun Oil*, 476 Pa. at 594, 383 A.2d at 522 (*Vrotney* standard tends to encourage employers and employees to maintain the status quo while negotiating).

81. 43 Pa. Cons. Stat. Ann. § 802(d) (Purdon 1964). See *supra* note 48 for a recitation of Pennsylvania's labor dispute disqualification provision.

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Ohio are ineligible for unemployment compensation benefits under section 4141.29(D)(1)(a) of the Ohio Unemployment Compensation Act (the Act)[82] unless their unemployment has resulted from a lockout.[83] Similarly, the Act does not define the term "lockout."[84] In *Alden v. United States Industrial Chemicals Co.*,[85] the court of appeals impliedly used the final cause test to determine whether a work stoppage was the result of a lockout.[86] In *Alden*, the court held that a lockout

82. OHIO REV. CODE ANN. §§ 4141.01-.99 (Anderson 1991).

83. Section 4141.29(D), in pertinent part, states that:

[N]o individual may serve a waiting period or be paid benefits under the following conditions:

(1) For any week with respect to which the administrator finds that:

(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this state or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute.

Id. § 4141.29(D)(1)(a).

Ohio's and Pennsylvania's express exception to the disqualification of unemployment compensation benefits for employees who have been "locked out" represents a minority view. The following list represents other states' statutes that expressly allow individuals who are unemployed because of a lockout to receive unemployment compensation benefits: ARK. CODE ANN. § 11-10-58(a) (1987); COLO. REV. STAT. ANN. § 8-73-109(1) (West 1990); CONN. GEN. STAT. ANN. § 31-236(a)(3) (West 1987); KY. REV. STAT. ANN. § 341.360(1) (Baldwin 1990); MD. ANN. CODE art. 95A, § 6(E) (1990); MICH. COMP. LAWS ANN. § 421.29(8) (West 1978); MINN. STAT. ANN. § 268.09(3)(c)(2) (West 1983); MISS. CODE ANN. § 71-5-513(A)(4)(a) (Supp. 1991); N.H. REV. STAT. ANN. § 282-A:36(II-a) (1987). For a collection of cases which interpret the statutory sections in the preceding list, *see generally*, Annotation, *Unemployment Compensation: Application of Labor Dispute for Benefits to Locked Out Employees*, 62 A.L.R.3d 437 (1975 & Supp. 1991).

84. The Ohio courts have defined a lockout as a "cessation of the furnishing of work to employees or a withholding of work from them in an effort to get for the employer more desirable terms." Zanesville Rapid Transit, Inc. v. Bailey, 168 Ohio St. 351, 354, 155 N.E.2d 202, 205 (1958) (citing Iron Moulders' Union No. 125 v. Allis-Chalmers Co., 166 F. 45, 52 (7th Cir. 1908)). A lockout is not necessarily confined to the "actual physical closing of the place of employment." *Id.* (citing Barnes v. Hall, 285 Ky. 160, 146 S.W.2d 929). Just as in Pennsylvania, the strike is viewed as a lockout's counterpart; the strike has been defined as the cessation of work by employees in an effort to obtain more desirable terms or working conditions. United States Coal Co. v. Ohio Bd. of Review, 16 Ohio Op. 323, 329 (C.P. Cuyahoga County 1939). Encompassing both the lockout and the strike is the labor dispute which broadly covers any "controversy between employer and employees concerning wages, working conditions or terms of employment." Leach v. Republic Steel Corp., 176 Ohio St. 221, 223-24, 199 N.E.2d 3, 5 (1964). Thus, the labor dispute includes both the strike and the lockout within its definition. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294, 300 (1950) ("'strikes' and 'lockouts' are species within the genus 'labor dispute'"); *see* Bays v. Shenango Co., 53 Ohio St. 3d 132, 133, 559 N.E.2d 740, 742 (1990); Korbee, *Labor Disputes and the Right to Unemployment Compensation in Ohio*, 46 U. CIN. L. REV. 823, 823-24 (1977).

85. 9 Ohio App. 2d 5, 222 N.E.2d 785 (1966).

86. *See* Korbee, *supra* note 84, at 827. The final cause test, also known as the "proximate cause" test or the "last final act" test, is a "quasi-tort test of causation [used] to fix responsibility for the work stoppage against the party whose actions constitute its final cause." *Id.* As previously stated, the Pennsylvania courts used the final cause test as a means for determining whether a claimant's unemployment was the result of a lockout. For a discussion of the final cause test used

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had occurred when a collective bargaining agreement expired and the employer's supervisory personnel refused to allow members of a bargaining unit to work, even though they were capable of working and were entirely willing to do so.[87] In *Alden*, virtually any shut-down of the employer's business, due to its nature, would have translated into extreme financial hardship.[88] Furthermore, in the event of a work stoppage, it would have taken several days for the employer to transfer replacement workers from other worksites.[89] Although the union agreed to continue working on a day-to-day basis, the employer demanded that the union provide a three-day notification before any termination of the extension.[90] The union refused to agree to such terms, and at the expiration of the agreement, the employer made work unavailable to the employees' union representatives.[91]

The final cause test was also used in *Zura v. Standard Slag Corp.*[92] In *Zura*, the corporation feared that its employees would strike following the expiration of the collective bargaining agreement.[93] The corporation believed that if its plant were left open, serious financial harm would occur.[94] Moreover, the corporation feared the creation of a dangerous situation.[95] When the agreement expired, the corporation closed its plant.[96] Based on these facts, the court held that the corporation's act of shutting-down the plant constituted a lockout.[97]

In *Zanesville Rapid Transit, Inc. v. Bailey*,[98] the Ohio Supreme Court also determined that a "reasonableness" standard must be applied in order to decide whether a work stoppage constitutes a lockout.[99] The court stated that a lockout exists when an employer offers terms for further employment which employees cannot reasonably be expected to accept so that, in essence, the employees have no alternative but to leave their employment.[100] In *Zanesville*, the employer had determined that due to its unhealthy financial condition, it would be

in Pennsylvania, see *supra* notes 50-51 and accompanying text.

87. *Alden*, 9 Ohio App. 2d at 5-6, 222 N.E.2d at 785.

88. *Id.* at 6, 222 N.E.2d at 785.

89. *Id.*

90. *Id.* at 7, 222 N.E.2d at 786.

91. *Id.*

92. 13 Ohio Misc. 317, 224 N.E.2d 176 (1965).

93. *Id.* at 317, 224 N.E.2d at 177.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*, 224 N.E.2d at 176.

98. 168 Ohio St. 351, 155 N.E.2d 202 (1958).

99. *Id.* at 355, 155 N.E.2d at 206.

100. *Id.* at 354-55, 155 N.E.2d 205-06 (citing Alamada v. Administrator, Unemployment Compensation Act, 137 Conn. 380, 389-91, 77 A.2d 765, 771 (1951)).

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unable to continue paying the same wages in a future contract.[101] For two and one-half months prior to the expiration of the contract, the union was aware of the employer's financial woes and of the employer's intention to cut wages by ten percent.[102] Furthermore, the employer, a public utility, was unable to pass its costs along to its customers and depended upon the city council in negotiating a franchise in order to operate its business.[103] Under these facts, the court held that there was no lockout because the employer's offer to cut wages was not unreasonable under the circumstances and "did not manifest a purpose on the part of the company to coerce" the union into accepting more favorable terms for the employer.[104]

In *Baker v. Powhatan Mining Co.*,[105] the Ohio Supreme Court apparently endorsed a "status quo" test when it held that a union had engaged in a strike[106] when it refused to accept a contract extension unless the company agreed to apply retroactively the negotiated terms of a future agreement.[107] In *Baker,* a two-year collective bargaining agreement between the company and the union was scheduled to expire on March 31, 1941.[108] Prior to the agreement's expiration, the two parties engaged in negotiations in order to form a new agreement.[109] The union and the company submitted various proposals which failed to bring about a new agreement.[110] Throughout the period prior to the expiration of the then existing agreement, the company demonstrated its willingness to extend the terms of that agreement beyond the date of its expiration, until the adoption of a new agreement.[111] The union, however, refused to continue working under the terms of the agreement beyond its expiration unless the company agreed to apply retroactively

101. *Id.* at 355, 155 N.E.2d at 206.

102. *Id.*

103. *Id.*

104. *Id.* at 355-56, 155 N.E.2d at 206.

105. 146 Ohio St. 600, 67 N.E.2d 714 (1946).

106. The *Baker* case occurred prior to the adoption of the present labor dispute disqualification provision which uses the term "lockout." In *Baker,* the court was confronted with construing the meaning of the term "strike" as used in Section 1345-6(c) of the General Code. Section 1345-6(c) of the General Code read in pertinent part:

> No benefits shall be payable to any individual who has lost his employment or has left his employment by reason of a strike in the establishment in which he was employed, as long as such strike continues; . . . or who refuses to accept an offer of work for which he is reasonably fitted.

Baker, 146 Ohio St. at 604, 67 N.E.2d at 717; *see also* United States Coal Co. v. Ohio Bd. of Review, 16 Ohio Op. 323, 327 (C.P. Cuyahoga County 1939).

107. *Baker,* 146 Ohio St. at 614-16, 67 N.E.2d at 721-22.

108. *Id.* at 602, 67 N.E.2d at 716.

109. *Id.*

110. *Id.* at 603, 67 N.E.2d at 716.

111. *Id.*, 67 N.E.2d at 717.

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the terms of a future agreement.[112] On the next working day following the expiration of the agreement, the employees failed to report for work.[113] Notices were posted several days prior to the agreement's expiration informing the employees that work would be available after March 31, and indeed, the company made work available under the terms of the pre-existing agreement subsequent to the expiration of the agreement.[114]

In concluding that the employees had engaged in a strike, the *Baker* court quoted extensively from *Sandoval v. Industrial Commission*,[115] a Colorado Supreme Court decision which involved facts nearly identical to the facts in *Baker*.[116] In *Sandoval*, the court held that employees had engaged in a strike where the employer made work available to its employees under the terms of a pre-existing agreement for the interim period following that agreement and where the employees refused to continue working under the expired agreement's terms unless the status quo was modified.[117] The *Baker* court directly applied the reasoning of the *Sandoval* court; and although the *Baker* court did not expressly use the term "status quo," the court impliedly accepted the concept of status quo[118] by stating: "claimants at all times had the opportunity to continue or resume employment at the very same work previously performed by them under the same terms and conditions which had prevailed for two years."[119]

In *Oriti v. Board of Review*,[120] the Cuyahoga County Court of Appeals expressly adopted the Pennsylvania Supreme Court's formulation of the status quo test in *Vrotney Unemployment Compensation Case*,[121] as well as the *Vrotney* court's rationale for the test, in order to

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112. *Id.*, 67 N.E.2d at 716-17.

113. *Id.*, 67 N.E.2d at 716.

114. *Id.* at 603-04, 67 N.E.2d at 717.

115. 110 Colo. 108, 130 P.2d 930 (1942).

116. *Baker*, 146 Ohio St. at 614-16, 67 N.E.2d at 721-22. As in *Baker*, the parties involved in *Sandoval* were the United Mine Workers of America and a coal company. *Baker*, 146 Ohio St. at 602-03, 67 N.E.2d at 716; *Sandoval*, 110 Colo. at 111, 130 P.2d at 932. The parties were also working under a contract which was due to expire on March 31, 1941. *Sandoval*, 110 Colo. at 111, 130 P.2d at 932. Throughout the period prior to the expiration of the agreement, the company demonstrated that employment would be available beyond the expiration of that agreement, under that agreement's terms. *Id.* The union, however, refused to allow the employees to continue working without a new agreement. *Id.*

117. *Sandoval*, 110 Colo. at 117, 121-22, 130 P.2d at 934, 936-37.

118. Oriti v. Bd. of Review, 7 Ohio App. 3d 311, 314, 455 N.E.2d 720, 724 (1983) (*Baker* decision marks the adoption of the status quo principle for determining when a work stoppage constitutes a strike).

119. *Baker*, 146 Ohio St. at 617, 67 N.E.2d at 722.

120. 7 Ohio App. 3d 311, 455 N.E.2d 720 (1983).

121. 400 Pa. 440, 163 A.2d 91 (1960). *See supra* notes 52-65 and accompanying text.

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determine when a work stoppage constitutes a lockout.[122] In *Oriti*, a collective bargaining agreement between management and the union was scheduled to expire on October 31, 1979.[123] Negotiations for a new contract were conducted throughout the latter months of 1979.[124] On October 30, the union withdrew all of its demands concerning non-economic issues.[125] On October 31, management submitted its final offer, which included both economic and non-economic issues and demanded the acceptance of its entire proposal in order for there to be a new agreement.[126] The union rejected management's proposal and the agreement expired.[127]

Following the union's rejection of management's proposal, but prior to the actual expiration of the agreement, the chief union negotiator asked the chief management negotiator to extend the terms of the then existing agreement.[128] The chief management negotiator refused to agree to an extension of those terms, and when asked under what terms the employees could work in the interim, the chief management negotiator failed to respond.[129] No communication was ever made to the employees regarding terms and conditions for interim employment,

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122. *Oriti*, 7 Ohio App. 3d at 312-13, 455 N.E.2d at 722-23. In adopting the status-quo test, the court in *Oriti* recited the following passage from *Vrotney:*

> In the very delicate and sensitive negotiations which are involved in the development of a new collective bargaining agreement to replace one that is nearing its expiration, all parties must be sincere in their desire to maintain the continued operation of the employer's enterprise. The law contemplates that collective bargaining will be conducted in good faith, with a sincere purpose to find a basis for agreement. Neither an adamant attitude of 'no contract, no work' on the part of the employees, nor an ultimatum laid down by the employer that work will be available only on his (employer's) terms, are serious manifestations of a desire to continue the operation of the enterprise. While either or both of these positions may legitimately be taken by the parties during the bargaining negotiations prior to the expiration of the existing contract, when the contract has in fact expired and a new agreement has not yet been negotiated, the sole test . . . of whether the work stoppage is the responsibility of the employer or the employees is reduced to the following: Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a 'lockout' and the disqualification for unemployment compensation benefits in the case of a 'stoppage of work because of a labor dispute' does not apply.

Id. (quoting *Vrotney*, 400 Pa. at 443-45, 163 A.2d at 93-94).

123. *Id.* at 311, 455 N.E.2d at 721.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

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so the employees ceased to work.[130] Under these facts, the court held that the employer's failure to extend the terms of the expired agreement constituted a compensable lockout.[131]

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130. *Id.* The only communication that management sent to the union was a letter dated November 7, 1979, in which management stated that it was unwilling to continue operation under the terms and conditions of the expired agreement, but that the plant remained open for the purpose of conducting meaningful negotiations. *Id.* at 311-12, 455 N.E.2d at 722.

131. *Id.* at 311, 455 N.E.2d at 720. In adopting the status quo test, the *Oriti* court held:

> [W]here employees offer to continue working under the terms of a pre-existing collective bargaining agreement pending final settlement of a labor dispute, the failure of the employer to accept such an offer constitutes a lockout unless it is demonstrated that the employer has a compelling reason for failing to so agree such that the extension of the contract be unreasonable under the circumstances.
>
> A decision as to whether a lockout has occurred must be made with this standard in mind.

Id. at 314, 455 N.E.2d at 724.

At first glance, the court in *Oriti* appears to have added a subjective element to the status quo test by stating that it is not improper for an employer to refuse to extend the status quo if the employer demonstrates that it has a compelling reason for its actions, and so long as an extension of the status quo would be unreasonable under the circumstances. As stated earlier, however, the Pennsylvania courts will not assess an employer's justifications for altering the status quo. *See* Bokosky Unemployment Compensation Case, 206 Pa. Super. 96, 105, 211 A.2d 124, 128 (1965) (refusing to consider factors such as employer's profitability and economic difficulties in determining whether work stoppage was a strike or a lockout); *supra* note 77 and accompanying text. Indeed, the status quo test used in Pennsylvania does not tolerate judicial assessment of subjective motivations upon which a work stoppage may be based. *See* Unemployment Compensation Bd. of Review. v. Sun Oil Co., 476 Pa. 589, 595, 383 A.2d 519, 522 (1978) (refusing to entertain motivational reasons for work stoppage and maintaining status quo test's objectivity and certainty); *see supra* note 77 and accompanying text. A closer examination of Pennsylvania case law, however, shows that the *Oriti* holding may be harmonized with Pennsylvania holdings on the issue of subjective motivations under the *Vrotney* test. *Oriti* relied on a Pennsylvania case which held that, in the course of negotiations, if an employer claims that it is unreasonable to maintain the status quo because a plant requires closing or because work can only continue under modified conditions, and it is demonstrated that an alteration in the status quo is necessary for the continued operation of the employer's business, then the status quo need not be maintained. *Oriti*, 7 Ohio App. at 314, 455 N.E.2d at 723 (citing Unemployment Compensation Bd. of Review v. Sun Oil Co, 19 Pa. Commw. 447, 338 A.2d 710 (1975), *aff'd*, 476 Pa. 589, 383 A.2d 519 (1978)). Such a holding is derived from the fact that the *Vrotney* test involves some subjectiveness in that the test requires an assessment of whether the employees have "offered to continue working *for a reasonable time* under the pre-existing terms and conditions of the employment." *Vrotney*, 400 Pa. at 444, 163 A.2d at 93; *see supra* note 63 and accompanying text. It is true that the Pennsylvania courts have demonstrated their unwillingness to weigh the amount of economic harm an employer is, or will be, suffering in determining whether a work stoppage is due to a lockout. *E.g.*, *Bokosky*, 206 Pa. Super. at 105, 211 A.2d at 128. The Pennsylvania courts, however, will use the "reasonable time" clause of the *Vrotney* test to find that an employer's breach of the status quo may be justified depending upon the *nature* of the employer's business. *E.g.*, Hershey Estates v. Unemployment Compensation Bd. of Review (Lerch Unemployment Compensation Case), 400 Pa. 446, 451, 163 A.2d 535, 537 (1960) (union's offer to continue working under pre-existing terms of collective bargaining agreement on day-to-day basis was not an offer to extend the status quo for a reasonable time where employment consisted of service industries such as hotel, laundry, department store, community inn, etc., thereby justifying employer's refusal to extend the terms of pre-existing agreement); *see also* Hoffman v. Unemployment Compensation Bd. of Review, 524 Pa. 470, 480-81, 574 A.2d 57, 62 (1990) (approving *Hershey* court's examination into nature of employer's

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Prior to applying the *Vrotney* test to the facts in *Oriti*, the court surveyed Ohio case law addressing the state's labor dispute disqualification provision and concluded that Ohio case law is entirely consistent with the reasoning in *Vrotney*.[132] Looking first to *Baker*,[133] the *Oriti* court determined that, in essence, the status quo principle had already been adopted for determining when a work stoppage may be regarded as a strike.[134] Next, the court cited *Alden*[135] and *Zura*[136] as support for the proposition that the status quo principle should also be applied to determine whether work stoppages are to be considered lockouts.[137] Moreover, the court stated that the principle of status quo was consistent with the Ohio Supreme Court's decision in *Zanesville*,[138] but under the facts of that case there was no lockout because an extension of the prior contract terms for any period would have been unreasonable.[139] As for *Zanesville's* use of the "reasonableness" standard, the *Oriti* court stated that the status quo test provides a "bright line" standard whereby "the refusal to maintain the *status quo* is presumptively unreasonable."[140] Thus, by blending together nearly fifty years of Ohio case law, the *Oriti* court concluded that an adoption of the *Vrotney* status quo test, for use in determining when a work stoppage is a lockout, is sound and fully comports with Ohio precedent regarding the issue.[141]

III. Facts and Holding

On October 1, 1982, a collective bargaining agreement went into effect between the Shenango Company (Shenango), at its Dover Plant,

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business in order to determine whether lockout had occurred).

Thus, the *Oriti* court was correct in noting that in Pennsylvania, a compelling reason may justify an employer's decision against extending the status quo, or may justify its decision to terminate the status quo at some point during extended negotiations. The *Oriti* holding, therefore, is best viewed as a maintenance of the *Vrotney* test's refusal to account for subjective motivations in determining whether work stoppages are due to lockouts, and should not be viewed as adding subjective elements to the predominantly objective test.

132. *Oriti*, 7 Ohio App. at 313-14, 455 N.E.2d at 723-24.

133. 146 Ohio St. 600, 67 N.E.2d 714 (1946). For a discussion of this case, see *supra* notes 105-19 and accompanying text.

134. 7 Ohio App. at 313-14, 455 N.E.2d at 723-24.

135. 9 Ohio App. 2d 5, 222 N.E.2d 785 (1966). For a discussion of this case, see *supra* notes 85-91 and accompanying text.

136. 13 Ohio Misc. 317, 224 N.E.2d 176 (1965). For a discussion of this case, see *supra* notes 92-97 and accompanying text.

137. *Oriti*, 7 Ohio App. 3d at 314, 455 N.E.2d at 724.

138. 168 Ohio St. 351, 155 N.E.2d 202 (1958). For a discussion of this case, see *supra* notes 98-104 and accompanying text.

139. *Oriti*, 7 Ohio App. 3d at 314, 455 N.E.2d at 724.

140. *Id.*

141. *Id.* at 313, 455 N.E.2d at 723.

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and the United Steelworkers of America, AFL-CIO-CLC, Local Union No. 6968 (the union).[142] The three-year agreement was scheduled to expire at midnight on September 30, 1985.[143] On September 27, the union offered to extend the agreement as it then existed, for one year, while negotiations continued.[144] Rejecting the union's offer, Shenango tendered a counter proposal in which Shenango offered the union a choice: as of October 1, the employees could work at the Dover Plant under the company's "term ending negotiations position" or, alternatively, could accept a thirty-day extension of the then-existing agreement.[145] The latter alternative, however, failed to include a cost-of-living adjustment "roll-in" which had been negotiated in 1982 and was due to take effect on September 30, 1985.[146] The union refused to accept either of Shenango's proposals, and on October 1, following the expiration of the agreement, the employees stopped working.[147]

During October and November of 1985, the employees applied for unemployment compensation benefits with the Ohio Bureau of Employment Services.[148] In December, the Administrator of the Ohio Bureau of Employment Services determined that appellants were unemployed due to a labor dispute other than a lockout at Shenango.[149] Pursuant to Ohio Revised Code section 4141.29(D)(1)(a),[150] the Administrator denied the employees' applications for unemployment benefits.[151]

The employees filed a request for reconsideration of the disallowance of unemployment compensation benefits.[152] The request was directed to the Unemployment Compensation Board of Review. On January 23, 1987, the Board held a hearing regarding the request, and affirmed the Administrator's decision denying unemployment compensation benefits.[153]

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142. *Bays*, 53 Ohio St. 3d at 132, 559 N.E.2d at 741.

143. *Id.*

144. *Id.*

145. *Id.* at 132-33, 559 N.E.2d at 741.

146. *Id.* at 133, 559 N.E.2d at 741. According to the dissent, all of the cost-of-living adjustments, including the one scheduled to roll-in on September 30, 1985, were separately negotiated terms which were to be added into the employees' standard hourly wages. *See id.* at 137, 559 N.E.2d at 745 (Holmes, J., dissenting). The cost-of-living adjustments were due to expire on September 30, 1985, the same day that the collective bargaining agreement itself was due to expire. *Id.* at 139, 559 N.E.2d at 747 (Wright, J., dissenting).

147. *Id.* at 133, 559 N.E.2d at 741.

148. *Id.*

149. *Id.*

150. Ohio Rev. Code Ann. § 4141.29(D)(1)(a) (Anderson 1991). For a recitation of section 4141.29(D)(1)(a), see *supra* note 83. For a general discussion of Ohio's Unemployment Compensation Act, see *supra* notes 8-41 and accompanying text.

151. 53 Ohio St. 3d. at 133, 559 N.E.2d at 741.

152. *Id.*

153. *Id.*

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On appeal, the Court of Common Pleas of Tuscarawas County reversed the Board of Review's denial of unemployment compensation benefits.[154] In turn, the court of appeals reversed the common pleas court's decision.[155] The court of appeals ruled that the trial court's judgment was contrary to law because the Board of Review's decision was neither unlawful nor against the manifest weight of the evidence.[156] The case then came before the Ohio Supreme Court pursuant to an allowance of a motion to certify the record.[157]

In reversing the judgment of the court of appeals, the *Bays* court specifically held that the union's offer to extend the pre-existing contract, including established cost-of-living adjustments, for one year, was an offer to maintain the status quo.[158] Before rendering its holding, the Ohio Supreme Court stated that Shenango's offer to extend the contract for thirty days, excluding the final cost-of-living adjustment due to be rolled-in on September 30, 1985, was not an offer to maintain the status quo.[159] In concluding that the union's offer represented an offer to maintain the status quo, the court validated the *Vrotney* status quo test which was previously adopted in *Oriti v. Board of Review*[160] by the Cuyahoga County Court of Appeals.[161]

The *Bays* court began its analysis by surveying prior Ohio court decisions which defined the terms "strike," "lockout," and "labor dispute."[162] Implying that the concept of status quo had been adopted by the Ohio Supreme Court in *Baker v. Powhatan Mining Co.*,[163] the court recited the "fully developed" *Vrotney* status quo test as enunciated by the Pennsylvania Supreme Court.[164] The court then quoted the

154. *Id.* For a discussion concerning the appeal process under the Ohio Unemployment Compensation Act, see *supra* notes 30-41 and accompanying text.

155. *Bays*, 53 Ohio St. 3d at 133, 559 N.E.2d at 741.

156. *Id.* For a discussion concerning the standard of review applied under Ohio's Unemployment Compensation Act, see *supra* notes 39-40 and accompanying text.

157. *Bays*, 53 Ohio St. 3d at 133, 559 N.E.2d at 741.

158. *Id.* at 136, 559 N.E.2d at 744.

159. *Id.* at 135, 559 N.E.2d at 743.

160. 7 Ohio App. 3d 311, 455 N.E.2d 720 (1983).

161. *Bays*, 53 Ohio St. 3d at 135, 559 N.E.2d at 743. This test was fully developed by the Pennsylvania Supreme Court in Erie Forge & Steel Corp. v. Unemployment Compensation Bd. of Review (Vrotney Unemployment Compensation Case), 400 Pa. 440, 163 A.2d 91 (1960). To date, *Bays* and *Oriti* are the only reported cases in which the *Vrotney* test has explicitly been used to determine whether a work stoppage is a "lockout" under § 4141.29(D)(1)(a) of the Ohio Unemployment Compensation Act, thereby entitling idle workers to unemployment compensation benefits. For a recitation of the *Vrotney* test adopted in *Oriti*, *see supra* note 122.

162. *Bays*, 53 Ohio St. 3d at 133-34, 559 N.E.2d at 742. For definitions of these terms, see *supra* note 84 and accompanying text.

163. 146 Ohio St. 600, 67 N.E.2d 714 (1946). *See supra* notes 105-19 and accompanying text.

164. *Bays*, 53 Ohio St. 3d at 134-35, 559 N.E.2d at 742-43. The *Bays* court stated that the status quo test was fully developed in the Vrotney Unemployment Compensation Case, 400 Pa.

status quo standard incorporated in the holding of *Oriti v. Board of Review*,[165] and noted that in order to assess whether a work stoppage was the result of a lockout, there would have to be a prior determination of who - the employer or the union - first refused to continue employment under the status quo, following the agreement's expiration but during continuing negotiations.[166]

To determine who first refused to continue employment, the *Bays* court initially looked to Shenango's actions and determined that Shenango failed to maintain the status quo.[167] Looking to the agreement between Shenango and the union, the court noted that at the time of negotiations, the most recent cost-of-living adjustment, made on July 1, 1985, was due to be paid to the employees, or "rolled-in," on September 30, 1985.[168] Shenango's offer to extend the contract for thirty days, however, excluded this last roll-in.[169] The court, therefore, found that Shenango's offer constituted an alteration of the contract signed in 1982, and thus, could not be considered an offer to maintain the status quo.[170]

Next, the court looked to the union's actions. It noted that the union offered to extend the contract for one year with the same formula for determining cost-of-living adjustments.[171] Choosing not to discuss whether a contract extension for a one-year period is reasonable, the court simply held that "the offer by the union to work under a preexisting contract which included established cost-of-living adjustments [was] an offer to maintain the status quo."[172] Justices Holmes and Wright dissented vigorously in opinions with which Chief Justice Moyer concurred.[173] Justices Holmes and Wright agreed that the status quo test is the correct test to apply in order to determine whether a work stoppage is a lockout.[174] They felt, however, that the majority misapplied and misinterpreted the test, and that the facts in *Bays* did

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440, 443-45, 163 A.2d 91, 93-94 (1960). For an oration of this test, see *supra* note 63 and accompanying text.

165. 7 Ohio App. 3d 311, 314, 455 N.E.2d 720, 724 (1983). The *Oriti* holding incorporated the *Vrotney* status quo test. For a direct quotation of the *Oriti* holding, see *supra* note 131. For a general discussion of the *Oriti* decision, see *supra* notes 120-41 and accompanying text.

166. *Bays*, 53 Ohio St. 3d at 135, 559 N.E.2d at 743 (quoting Philco Corp. v. Unemployment. Compensation Bd. of Review, 430 Pa. 101, 103, 242 A.2d 454, 455 (1968)).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 136, 559 N.E.2d at 744.

172. *Id.*

173. *Id.* at 136, 138, 559 N.E.2d at 744, 746 (Holmes and Wright, J.J., dissenting)

174. *Id.*

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not point to a lockout.[175] Additionally, Justice Wright believed that the majority acted beyond the scope of its authority by disturbing the Board of Review's decision that the union failed to propose an extension of the agreement which satisfied the status quo test.[176]

IV. Analysis

A. *Adoption of the Status Quo Standard in Ohio*

In *Bays v. Shenango Company,*[177] the majority and both dissenting opinions agreed that the status quo standard adopted by the court of appeals in *Oriti v. Board of Review*[178] comports with Ohio case law on the issue of whether a work stoppage is due to a strike or a lockout.[179] Based on the purpose of the Ohio Unemployment Compensation Act, the outright adoption of a status quo standard is appropriate. Ohio decisions have consistently stated that the unemployment act is designed to alleviate the hardships of unemployment by providing financial assistance to those who are unemployed through no fault of their own.[180] This purpose is fortified by the legislature's express intent

175. *Id.* For a more thorough discussion of the issues upon which the dissents focused, see *infra* notes 197-99, 215-19, 226-29, 240-45, 249-56 and accompanying text.

176. *Id.* at 141, 559 N.E.2d at 748. According to Justice Wright, there was evidence that the union never communicated to Shenango that it sought a contract extension without quarterly cost-of-living increases. *Id.* Justice Wright recited a portion of the testimony taken at trial in which the president of the union was asked and stated the following:

> Q. Well, lets - lets go through this again. What I want to find out, when you offered the one year extension, was that with four cost-of-living increases over the period of that one year per - that one year?
>
> A. To the best of my knowledge, on the 20th we offered it that way, yes.
>
> Q. Okay. Did you modify this offer at any time after that before the expiration of the old contract?
>
> A. On - when we discussed the contract extension on another occasion - I'm not sure which date it was - we told them we would give them [a] one year extension for help in the future, and at that time it was my feeling we were not talking about any cost-of-living, 'cause we told 'em [sic] at that time we could not talk 30 and 20 percent reduction.
>
> Q. When you say it was your feeling that you weren't talking about cost of living, did you ever make it clear to the Company that the Union was willing to extend the contract for a one year period without any further cost-of-living increases?
>
> A. *I don't believe that we ever got far enough to discuss that.*

Id. (emphasis added by Justice Wright). Applying the standard of review set forth in § 4141.28(O) of the Ohio Revised Code, Justice Wright concluded that the trial court acted beyond the scope of its authority and that the board's denial of unemployment compensation benefits should have been reinstated. *Id.* For a discussion of the standard of review mandated by § 4141.28(O), see *supra* notes 39-40 and accompanying text.

177. 53 Ohio St. 3d 132, 559 N.E.2d 740 (1990).

178. 7 Ohio App. 3d 311, 455 N.E.2d 720 (1983).

179. *See generally Bays*, 53 Ohio St. 3d 132, 559 N.E.2d 740.

180. *E.g.*, Irvine v. Unemployment Compensation Bd. of Review, 19 Ohio St. 3d 15, 17, 482 N.E.2d 587, 589 (1985) (quoting Salzl v. Gibson Greeting Cards 61 Ohio St. 2d 35, 39, 399 N.E.2d 76, 79 (1980)) ("'[the] act was intended to provide financial assistance to an individual

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that section 4141.29(D)(1)(a)[181] be construed liberally.[182] By affirming the status quo standard, which determines fault by placing responsibility for a work stoppage upon the party who has breached the status quo,[183] the *Bays* court has allowed for a mechanism by which the Act's overriding purpose may be effectuated.[184]

In determining whether the status quo test is the proper mechanism to further the purpose of Ohio's unemployment compensation statue, it is helpful to examine Pennsylvania's approach to unemployment compensation because Pennsylvania's disqualification provision is similar to Ohio's in both language and purpose.[185] Unlike Ohio's unemployment compensation statute which contains no declaration of public policy, Pennsylvania's statute expressly provides unemployment compensation benefits for those who are unemployed through no fault of their own.[186] Indeed, this premise is deemed the central notion of the

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who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own.' "); United States Coal Co., v. Unemployment Compensation Bd. of Review, 16 Ohio Op. 323, 327 (C.P. 1939), *aff'd*, 66 Ohio App. 329, 32 N.E.2d 736, (1940) ("the broad intent and purpose of this act is to provide against the risks of unemployment by granting security and compensation to those persons who become separated from their employment through no condition of their own creation . . . . "); *see also* Leach v. Republic Steel Corp., 176 Ohio St. 221, 223, 199 N.E.2d 3, 5 (1964) ("The purpose of the act . . . is to enable unfortunate employees, who become and remain *involuntarily* unemployed . . ., to subsist on a reasonably decent level . . . ."); Nowak v. Board of Review, 150 Ohio St. 535, 537-38, 83 N.E.2d 208, 209 (1948) ("The purpose of this law is to assist those who are unfortunate enough to be involuntarily unemployed . . . .").

181. OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (Anderson 1991).

182. *Id.* § 4141.46 ("Sections 4141.01 to 4141.46, inclusive, of the Revised Code shall be liberally construed.").

183. *See* Comment, *supra* note 51, at 73-75 (discussing arguments concerning Pennsylvania's fault-based disqualification provision and status quo test); *see generally* Lewis, *The Lockout Exception: A Study in Unemployment Insurance Law and Administrative Neutrality,* 6 CAL. W. L. REV. 89 (1969).

184. A discussion of the virtues and vices of fault based labor dispute disqualification provisions contained in unemployment compensation statutes such as Ohio's is beyond the scope of this article. For a discussion of the various views regarding this topic, see Comment, *supra* note 51, at 73-75.

185. For a recitation of Pennsylvania's labor dispute disqualification provision, see *supra* note 48.

186. 43 PA. CONS. STAT. ANN. § 752 (Purdon 1964). Section 752 is entitled "Declaration of Public Policy" and reads in full:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the Commonwealth. Involuntary unemployment and its resulting burden of indigency falls with crushing force upon the unemployed worker, and ultimately upon the Commonwealth and its political subdivisions in the form of poor relief assistance. Security against unemployment and the spread indigency can best be provided by the systematic setting aside of financial reserves to be used as *compensation for loss of wages by employees during periods when they become unemployed through no fault of their own.* The principle of the accumulation of financial reserves, the sharing of risks, and the payment of compensation with respect to unemployment meets the need of protection against the hazards of unemployment and indigency. The Legislature, therefore, declares

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Pennsylvania statute.[187] Furthermore, the language of Pennsylvania's disqualification provision is substantially similar to Ohio's because they both state that work stoppages resulting from lockouts do not disqualify claimants from collecting unemployment compensation benefits.[188] Moreover, prior to the creation of the *Vrotney* status quo test, both Pennsylvania and Ohio courts used the final cause test to determine whether a lockout had occurred.[189] Thus, Pennsylvania and Ohio have much in common with regard to the legal issue of disqualification of unemployment compensation benefits when individuals become unemployed because of a labor dispute. Based on their similarly worded statutes which manifest analogous legislative purposes,[190] and court decisions which show the existence of common roots prior to the creation of the status quo test,[191] it is reasonable for Ohio to adopt the status quo test which Pennsylvania has been using and clarifying for over thirty years. Indeed, all of the Justices who participated in the *Bays* decision believe that the status quo test is proper for Ohio. The crucial question, therefore, is not *whether* status quo should be the standard used in Ohio, but *what* exactly that standard envisions.

In examining the remaining issues in the *Bays* case and in determining what the status quo standard envisions, it is logical that Pennsylvania precedent covering similar issues should control. The status quo test was enunciated by the Supreme Court of Pennsylvania in 1960 and has been consistently applied in unemployment compensation cases involving work stoppages due to labor disputes.[192] The court of appeals in *Oriti* adopted Pennsylvania's test.[193] Furthermore, both the majority

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> that in its considered judgment the public good and the general welfare of the citizens of this commonwealth require the exercise of the police powers of the Commonwealth in the enactment of this act for the *compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.*

Id. (emphasis added).

187. Miller v. Unemployment Compensation Bd. of Review, 152 Pa. Super. 315, 321, 31 A.2d 740, 743 (1943). "The fundamental idea of the [Pennsylvania Unemployment Compensation Law] is to provide a reserve fund to be used for the benefit of persons unemployed through no fault of their own." *Id.*

188. See *supra* notes 48 and 83 respectively for a recitation of Pennsylvania's and Ohio's disqualification provisions.

189. For a discussion of Pennsylvania's use of the final cause test prior to its creation of the status quo test, see *supra* notes 49-51 and accompanying text. For the same discussion, but covering Ohio decisions, see *supra* notes 85-97 and accompanying text.

190. *See supra* notes 180, 186-87 and accompanying text.

191. *See supra* notes 45, 86 and accompanying text.

192. *See, e.g.*, Miceli v. Unemployment Compensation Bd. of Review, 519 Pa. 515, 520-21, 549 A.2d 113, 115 (1988) (noting that the *Vrotney* status quo test is well established and has been consistently applied in unemployment compensation cases where a work stoppage has resulted from a labor dispute.)

193. *Bays*, 53 Ohio St. 3d 133, 135, 559 N.E.2d 740, 743 (citing *Oriti*, 7 Ohio App. 3d 311, 455 N.E.2d 720).

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and the dissenting opinions in *Bays* supported their positions with Pennsylvania case law.[194] Yet, the *Bays* court held differently than the Pennsylvania Supreme Court on substantially similar issues. Although one might expect that a decision breaking from relevant precedent would be bolstered by justifications for such a deviation, the *Bays* court departed from Pennsylvania precedent without clearly explaining why it felt compelled to do so.

B. *The Effect of Cost-of-Living Adjustments Under the Concept of Status Quo*

The majority in *Bays* held that an offer by the union to work under the terms of the expired agreement for a reasonable period until a new agreement could be negotiated necessarily needed to include all of the prior agreement's terms in order to qualify as an offer to maintain the status quo.[195] The majority, however, cited no authority for its conclusion on this specific issue.[196] Justices Holmes and Wright, on the other hand, felt that the majority misconstrued the concept of status quo and believed that during the period following the expiration of the agreement, the extension of that agreement should not have included cost-of-living adjustments.[197] Unlike the majority, Justices Holmes and

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194. *See generally id.*

195. *Id.* at 136, 559 N.E.2d at 744. Such required terms included cost-of-living adjustments implemented in accordance with the pay schedule contained in the expired agreement. *Id.*

196. There is authority for the notion that in order to maintain the status quo during a contract hiatus, an employer must continue to pay periodic adjustments as envisioned by the expired contract. In fact, this is considered the majority view. This view, however, has been espoused in labor disputes concerning labor law issues, adjudicated under state and federal labor relations acts, and not generally in the context of unemployment compensation disputes. *See* Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1268-71 (1985) (examining treatment of status quo in the public and private sectors within the context of labor law); *see also* Vienna School District No. 55 v. Illinois Educ. Labor Relations Board, 162 Ill. App. 3d 503, 507-09, 515 N.E.2d 476, 479-80 (1987) (discussing status quo under state labor law act and holding that yearly salary increases furnished by school board were status quo); Galloway Township Board of Educ. v. Galloway Township Educ. Assoc., 78 N.J. 25, 48-53, 393 A.2d 218, 230-32 (1978) (discussing effect of unilateral changes/disruptions of status quo under principles of labor law, and concluding that New Jersey labor statute requires payment of annual step increments in accordance with prior contract during negotiations); Triborough Bridge & Tunnel Authority, 5 P.E.R.B. ¶ 3037, 3064-65 (N.Y. 1972) (holding that New York's labor statute requires employer to maintain incremental salary adjustments during negotiations following expiration of contract). *But see* Fairview School District v. Commonwealth Unemployment Compensation Bd. of Review, 499 Pa. 539, 547, 454 A.2d 517, 521 (1982) (holding that school district's refusal to allow step up in pay during interim period following expiration of prior contract was not alteration of status quo and that work stoppage resulted from strike for the purposes of unemployment compensation).

For authority asserting the view that unemployment compensation law and labor law are two distinct areas, and that principles of the latter should not be used to decide issues involving the former, see *infra* note 224 and accompanying text.

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197. *Bays*, 53 Ohio St. 3d at 137, 139-40, 559 N.E.2d at 745, 747 (Holmes and Wright, J.J., dissenting).

Wright pointed to the Pennsylvania Supreme Court decision of *Fairview School District v. Unemployment Compensation Board of Review* [198] as direct support for their positions.[199]

In *Fairview*, a collective bargaining agreement between the school board and the teachers expired on August 26, 1979.[200] The two parties agreed that the teachers would continue working under the terms of the expired agreement while negotiations for a new agreement took place.[201] On September 7, the teachers received their regularly scheduled bi-weekly paychecks.[202] These paychecks were computed under the same salary matrix contained in the expired agreement, but failed to include a step-up in pay based on the teachers' additional year of service, which would have been applicable under the terms of the old agreement.[203]

After filing a grievance, the teachers' union initiated a work stoppage and claimed that they had been locked out due to the school district's failure to implement pay increases in accordance with the extended agreement.[204] The Unemployment Security Office denied the teachers unemployment benefits.[205] The Unemployment Compensation Board of Review granted benefits and the Pennsylvania Commonwealth Court affirmed.[206]

On appeal to the Supreme Court of Pennsylvania, the school district argued that by paying the teachers the same salaries that were paid to them in the last year of the expired contract, rather than stepping up their salaries for an additional year of service, the status quo was not disrupted.[207] The school district reasoned that the salary schedules containing the salary increases in the expired contract were bargained for by the teachers and the school district only for the years covered by the expired agreement and that they were never envisioned to continue beyond those years.[208] Furthermore, the school district ar-

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198. 499 Pa. 539, 454 A.2d 517 (1982).

199. *Bays*, 53 Ohio St. 3d at 137, 140, 559 N.E.2d at 745, 747 (Holmes and Wright, J.J., dissenting).

200. *Fairview*, 499 Pa. at 541, 454 A.2d at 518.

201. *Id.* at 541-42, 454 A.2d at 518.

202. *Id.* at 542, 454 A.2d at 518.

203. *Id.*

204. *Id.*, 454 A.2d at 519.

205. *Id.*

206. *Id.* The Commonwealth Court held that a disruption of the status quo occurred when the school district failed to step-up the teachers' salaries in accordance with the terms of the expired agreement during the year in which negotiations for a new agreement were under way. Thus, the teachers were eligible for unemployment benefits. *Id.* at 544, 454 A.2d at 520.

207. *Id.*

208. *Id.* at 544-45, 454 A.2d at 520.

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gued that payment of salary increases during the period in which a new agreement was being negotiated would undermine the bargaining positions of the parties.[209]

The Pennsylvania Supreme Court agreed with the school district and held that its failure to pay the teachers stepped up salaries did not disrupt the status quo.[210] The court relied on cases from two other jurisdictions[211] which held that the status quo requires a freezing of the pay rate during the interim period at the rate of the previous year.[212] In doing so, the Pennsylvania Supreme Court concluded:

> The underlying rationale for the status quo requirement is that during the interim period between contracts, the employer may continue operations and the employee may continue working, while the parties are free to negotiate on an equal basis in good faith. Maintenance of the status quo is merely another way of stating that the parties must continue the existing relationship in effect at the expiration of the old contract. To require the School District to pay stepped up salary increases beyond the specified years contained in the expired contract changes the existing relationship in the context of the terms and conditions subject to the very negotiations sought to be fostered.[213]

The *Fairview* decision clearly demonstrates that in construing the status quo test within the context of pay increases, the Pennsylvania courts will find no disruption of the status quo when an employer fails to pay increased wages during the interim period following the expiration of a previous collective bargaining agreement. Simply stated, employers will not be deemed to have locked out their employees when they continue to pay the same wages that were paid during the final year of the expired agreement. Hence, employees may not collect unemployment benefits under such circumstances.

The Ohio Supreme Court in *Bays*, however, came to the opposite

209. *Id.* at 545, 454 A.2d at 520.

210. *Id.*, 454 A.2d at 521.

211. *See* M.S.A.D. No. 43 Teachers Assoc. v. M.S.A.D. No. 43 Bd. of Directors, 432 A.2d 395 (Me. 1981); Board of Coop. Educ. Servs. v. New York Pub. Employment Relations Bd. (BOCES), 41 N.Y.2d 753, 395 N.Y.S.2d 439, 363 N.E.2d 1174 (1977). *M.S.A.D.* represents a minority view of status quo, and the validity of the BOCES decision has been affected by the subsequent passage of legislation in New York. For references discussing these cases and general commentary on the issues contained therein, see Befort, *supra* note 196, at 1268-72; *see generally supra* note 196.

212. *Fairview*, 499 Pa. at 545-47, 454 A.2d at 520-21. As representative of its view on status quo, the Pennsylvania Supreme Court quoted the following passage: "'To say that the status quo must be maintained during negotiations is one thing; to say that the status quo includes a change and means automatic increases in salary is another.'" *Id.* at 546, 454 N.E.2d at 521 (citing *Board of Coop. Educ. Servs.*, 41 N.Y.2d 753, 758, 395 N.Y.S.2d 439, 443, 363 N.E.2d 1174, 1177).

213. *Id.* at 546-47, 454 A.2d at 521.

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conclusion.[214] Because the court's decision clearly opposes Pennsylvania's ruling on this issue, it appears that the Ohio Supreme Court, while agreeing that status quo is a workable standard serving many useful purposes under Ohio's Unemployment Compensation Act, has consciously chosen not to adopt all of Pennsylvania's rulings on the various issues that have been analyzed under the status quo test.[215] Without stating why Ohio is compelled to deviate from Pennsylvania's course, especially when each Justice on the court fortified his or her reasoning with Pennsylvania case law, the court has needlessly created an air of uncertainty as to how future unemployment cases will be decided and, therefore, has invited future litigation.

The better view regarding the effect of cost-of-living adjustments under the concept of status quo is that of Justices Holmes and Wright. Justice Holmes believed that cost-of-living adjustment roll-ins are not included in the concept of status quo.[216] He said that the roll-ins originally were negotiated terms to be added to the employees' wages, and to continue the roll-ins during negotiations at the expiration of the agreement would contravene the notion of status quo and would be counterproductive to the entire negotiating process.[217]

Like Justice Holmes, Justice Wright believed that an offer to maintain cost-of-living adjustment roll-ins, in accordance with the schedule contained in the expired contract, was not an offer to maintain the status quo.[218] Justice Wright maintained that the cost-of-living adjustments, which amount to salary increases, expired on the same date as did the contract of employment and that they must be separately

214. *Bays*, 53 Ohio St. 3d at 136, 559 N.E.2d at 744.

215. This proposition presumes that the majority was aware of, and understood, the Pennsylvania case law that is directly on point on this issue. If this presumption is erroneous and the majority meant to adopt Pennsylvania's rules of decision concerning status quo, or at least its rules concerning the issue of pay increases under status quo, then the majority clearly held incorrectly.

216. *Bays*, 53 Ohio St. 3d 132, 137, 559 N.E.2d 740, 745 (Holmes, J., dissenting) (citing *Fairview*, 499 Pa. 539, 454 A.2d 517).

217. *Id.* With regard to roll-ins, Justice Holmes stated:

> Maintaining the status quo requires both parties to continue negotiations without demanding economic benefit in the interim. Allowing roll-ins would be counterproductive to these tenuous labor negotiations. In a situation where the roll-ins are advantageous to the employees, and it is hard to imagine where this would not be the case, the allowance of roll-ins would be a disincentive to settlement. This is especially true when these roll-ins are the subject of ongoing negotiations.
>
> As the Pennsylvania Commonwealth Court held in *Fairview School Dist.*, . . . "[t]o require the School District to pay stepped up salary increases beyond the specified years contained in the expired contract changes the existing relationship in the context of the terms and conditions subject to the very negotiations sought to be fostered.

Id. (citations omitted) (Holmes, J., dissenting) (the case of *Fairview School Dist.*, was decided by the Pennsylvania Supreme Court, not the Pennsylvania Commonwealth Court).

218. *Id.* at 139, 559 N.E.2d at 747 (Wright, J., dissenting).

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negotiated as part of wage bargaining.[219] Justice Wright advised that the Pennsylvania Supreme Court's holding in *Fairview* should have been applied in the present case.[220] He further argued that the court should have found that the union's "offer of a one-year contract with four cost-of-living increases obviously constituted an offer to enter a new one-year contract" and therefore, the subsequent work stoppage resulted from a strike.[221]

There are several justifications for adopting the dissenters' view regarding cost-of-living adjustments under the concept of status quo. Justices Holmes and Wright presented more persuasive arguments on this issue because they presented relevant precedent from the jurisdiction which developed the test that Ohio adopted, whereas the majority presented no precedent for its view on the issue.

Beyond this, however, the realities of the negotiating process point to the conclusion that during the interim period between agreements, wages should be frozen at the pre-existing agreement's rate. To allow continued cost-of-living roll-ins during the contractual hiatus in effect is to to extend the contract beyond its bargained-for term of years to the detriment of the party who wishes to fairly do away with terms and conditions which it views as oppressive.[222] Furthermore, the likelihood that the satisfied party will truly bargain in good faith is seriously diminished.[223] It has been argued, of course, that the unemployment compensation proceeding is not necessarily the place to adjudicate labor law issues such as good faith bargaining,[224] and that the first goal

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219. *Id.* (Wright, J., dissenting). Justice Wright noted that appellants certainly had the right to ask for such increases, but that such an offer may not be viewed as an extension of the status quo. *Id.* at 139-40, 559 N.E.2d at 747 (Wright, J., dissenting).

220. *Id.* (Wright, J., dissenting).

221. *Id.* (Wright, J., dissenting).

222. *See generally Fairview*, 499 Pa. 539, 454 A.2d 517.

223. *Bays*, 53 Ohio St. 3d at 137, 559 N.E.2d at 745 (Holmes, J., dissenting).

224. For example, an examination of Pennsylvania case law, demonstrates the view that issues such as good faith bargaining should not necessarily be of concern to courts adjudicating unemployment compensation cases. Justice Hutchinson, dissenting vigorously in Local 730 v. Unemployment Compensation Bd. of Review, 505 Pa. 480, 499, 480 A.2d 1000, 1010 (1984), stated that federal and state labor statutes were enacted to promote labor policies such as good faith bargaining. He argued that the continual injection of labor law into unemployment compensation cases has resulted in a disregard for the policy objectives which motivated Pennsylvania's legislature to pass the unemployment act in the first place. *Id.* Justice Hutchinson concluded his point by stating:

> The unemployment compensation proceeding is not the proper place in which to adjudicate alleged violations of either state or federal labor law or to affirmatively promote policies addressed by the statutes governing labor relations. *See, e.g., D'Amato v. Unemployment Compensation Board of Review*, 196 Pa.Super. Ct. 76, 78, 173 A.2d 680, 682 (1961) ("[t]he principle objective of the Unemployment Compensation Law is to alleviate economic distress in individual cases[;] . . . [t]he Law is not designed or intended to implement or to impede collective bargaining between unions and employers"); *Carl Colteryahn*

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of unemployment compensation, in Ohio and Pennsylvania, should be to pay benefits to those who are unemployed due to no fault of their own.[225] There is no reason, however, to devise rules of law which conflict with other areas of the law when those conflicts need not persist. Furthermore, the issue of fault may be seriously questioned when one party insists upon continued cost-of-living adjustments during an interim period, though the specific period for which those terms were exclusively bargained has ended, and that party's insistence leads to a labor dispute and work stoppage.[226] A rule that allows both parties to continue operations under the pre-existing agreement, but allows neither party to benefit through an extension of separately negotiated terms that should have expired, avoids the harshness resulting from unemployment, injects certainty into findings of fault, and fosters good faith negotiations during the interim period.

C. Extending the Expired Agreement for a Reasonable Period Under the Concept of Status Quo

In *Bays*, the Ohio Supreme Court held that the union's proposal to extend the expired agreement for one year was an offer to continue working for a reasonable period, and therefore, represented an offer to maintain the status quo.[227] Once again, however, the court provided no support for its position. Moreover, the court failed to discuss what is meant by the term "reasonable period." Rather, the court merely noted that the union's offer to extend the agreement was for a one year period, yet included no discussion regarding the issue of what constitutes a "reasonable period."

Justices Holmes and Wright maintained that an offer to extend the contract for one year represented an unreasonable period, and that, in fact, the offer was for a new contract.[228] Thus, they believed that the

Dairy, Inc. v. Unemployment Compensation Board of Review, 46 Pa. Commonwealth Ct. 319, 326, 407 A.2d 71, 74 (1979) ("a compensation proceeding is not the place to adjudicate an alleged collective bargaining agreement violation or a claimed unfair labor practice").

Id. at 499-500, 480 A.2d, 1010-11.

225. *See supra* notes 180-187 and accompanying text.

226. This assertion is not intended as a call for a more subjective approach in determining whether unemployment compensation benefits should be given when a work stoppage results because of a labor dispute. Courts should maintain the objectiveness of the status quo test in deciding whether a work stoppage is due to a lockout. This assertion is simply intended as an attempt to place the issue of cost-of-living adjustments within the confines of one's normal understanding of the term "fault." By viewing the issue in this manner, it may be easier to understand exactly what insisting upon continued cost-of-living adjustments means.

227. *Bays*, 53 Ohio St. 3d at 135-36, 559 N.E.2d at 744.

228. *Id.* at 136-40, 559 N.E.2d at 744-48 (Holmes and Wright, J.J., dissenting).

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union's offer was not one to preserve the status quo.[229] As with the issue of cost-of-living adjustments, Justices Holmes and Wright supported their positions with Pennsylvania case law.

Both Justices relied on *Bishop v. Unemployment Compensation Board of Review* [230] which was decided in the Pennsylvania Commonwealth Court.[231] In this case, a collective bargaining agreement between the union and the employer expired on May 31, 1983.[232] Before the expiration of the agreement, the union offered to continue working under the terms of the existing agreement for a one year period.[233] The employer desired a reduction in the pay scale and did not accept this offer.[234] At no time during negotiations did either side offer to continue working under the terms of the existing agreement for a period of less than one year.[235] Negotiations produced no new agreement and the union commenced a work stoppage on June 1, 1983, the day after the agreement expired, although work remained available on that date.[236]

At each level below the Commonwealth Court, the claimants were denied unemployment benefits.[237] At these levels, the authorities determined that "one year is not a reasonable period . . . because it would bind the Employer to the terms and conditions of the existing agreement, from which it was trying to escape, for a full year and the Union would then have little or no incentive to bargain for that period."[238] The Commonwealth Court agreed and stated further that the union's offer was actually an offer for a new one-year agreement with the same terms as the existing agreement, and as such, it did not represent an offer to maintain the status quo during negotiations.[239]

Courts in Pennsylvania have held that union offers to continue preexisting agreements for periods of thirty, sixty, or ninety days, as well as offers to work on a day-to-day basis, satisfy the reasonable period

229. *Id.*
230. 90 Pa. Commw. 553, 496 A.2d 110 (1985).
231. *Bays,* 53 Ohio St. 3d at 138-39, 559 N.E.2d at 745-47.
232. *Bishop,* 90 Pa. Commw. at 557, 496 A.2d at 112.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 559, 496 A.2d at 113.
239. *Id.; see also* Jehn v. Unemployment Compensation Bd. of Review, 110 Pa. Commw. 209, 215-16, 532 A.2d 57, 59-60 (1987) (refusing to overturn Board's finding that union's offer to return to work for one year period was in fact an attempt to effect an end to negotiations by means of a new one year contract); Hoffman v. Unemployment Compensation, Bd. of Review, 100 Pa. Commw. 264, 270, 514 A.2d 668, 671 (1986) ("Union's offer to resume work for a period of one year was not an offer to continue the status quo pending negotiations; rather, it was an offer for a new one year contract on the same terms and conditions as the prior contract."), *rev'd on other grounds,* 524 Pa. 470, 574 A.2d 57 (1990).

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standard under the *Vrotney* status quo test.[240] An overriding concern in determining what constitutes a reasonable period is whether that period creates an environment in which the parties will continue to negotiate in good faith.[241] This is precisely the point that Justices Holmes and Wright addressed. Justice Holmes stated that a one-year extension of the contract is actually no extension at all, but instead is an offer of an entirely new contract.[242] According to Justice Holmes, a period of one year would bind the employer to a fixed one-year contract which, under other circumstances, the employer would never be willing accept.[243] Justice Holmes correctly stated that the *Oriti* standard requires an offer to continue working under the expired contract for a reasonable period but that "the majority has betrayed the *Oriti* standard and has substituted a new one in its place."[244]

Justice Wright, in his dissent, also believed that an offer to extend an expired contract for one year is an unreasonable period, and that in essence, such an offer is tantamount to a new one-year contract.[245] According to Justice Wright, a one-year extension of the prior contract would result in postponing the negotiating process rather than effectuating what he believed to be one of the purposes of status quo: to create an environment suitable for good faith collective bargaining.[246]

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240. *Hoffman*, 524 Pa. at 484, 574 A.2d at 64; Orr v. Unemployment Compensation Bd. of Review, 120 Pa. Commw. 45, 52, 548 A.2d 360, 363 (1988) (citing Unemployment Compensation Bd. of Review v. Sun Oil Co., 476 Pa. 589, 383 A.2d 519 (1978)).

241. *See Hoffman*, 524 Pa. at 484, 574 A.2d at 63-64; *Orr*, 120 Pa. Commw. at 365, 548 A.2d at 365 (citing Bedow v. Unemployment Compensation Bd. of Review, 97 Pa. Commw. 192, 510 A.2d 152 (1986)); *Jehn*, 110 Pa. Commw. at 59, 532 A.2d at 59; *Bishop*, 90 Pa. Commw. at 559, 496 A.2d at 113.

242. *Bays*, 53 Ohio St. 3d at 138, 559 N.E.2d at 745 (Holmes, J., dissenting).

243. *Id.* at 137, 559 N.E.2d at 745 (Holmes, J., dissenting).

244. *Id.* at 137-38, 559 N.E.2d at 745 (Holmes, J., dissenting). Hypothesizing as to the effect of the majority's ruling, Justice Holmes stated:

> Henceforth . . . unions need only offer a one-year renewal of the current contract. If the current contract is unacceptable to the employer, the employer is nevertheless forced to accept this arbitrary one-year extension or be found to have locked out the employee without having offered or agreed to status quo in the interim. . . . The majority's holding will have the effect of turning three-year contracts into four-year contracts if the union finds this option more acceptable than what is being offered by the employer at the end of the current contract. One must also wonder whether this arbitrary one-year extension is itself renewable, thus binding the disadvantaged employer into the contract indefinitely.

Id.

245. *Id.* at 138-39, 559 N.E.2d at 746-47 (Wright, J., dissenting).

246. *Id.* Justice Wright found support for his views in Pennsylvania case law. Quoting *Vrotney*, 400 Pa. 440, 444, 163 A.2d 91, 93 (1960), Justice Wright stated that the *Vrotney* court's reason for "encouraging the parties to maintain the status quo once a contract has expired is 'that collective bargaining will be conducted in good faith, with a sincere purpose to find a basis for agreement.'" *Bays*. 530 Ohio St. 3d at 139, 559 N.E.2d at 746. Justice Wright also quoted from *Bishop*, 90 Pa. Commw. at 559, 496 A.2d at 113, in which the court ruled that under the circumstances of that case, a one-year extension of the existing agreement represented an unreasonable

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As with the issue of cost-of-living adjustments, Justices Holmes and Wright provided the better reasoned arguments regarding the "reasonable period" clause of the *Vrotney* status quo test, and their views represent the correct path for Ohio. Yet, unlike the issue of cost-of-living adjustments, the majority not only failed to support its finding that one year was a reasonable period for extending the status quo with any precedent, but failed to discuss the issue altogether.

The same reasons supporting a finding that cost-of-living adjustments should not be included in the concept of status quo also support a finding that one year, under the facts of *Bays*, does not represent a reasonable period to extend the status quo. An offer to extend the status quo for a period as long as one year extends a contract beyond the years for which it was bargained and, therefore, unfairly locks one of the parties into oppressive terms and conditions. A finding that one year is not a reasonable period also comports with the primary purpose of Ohio's unemployment compensation statute[247] because a party which decides that it will continue to work under the status quo only for a period of one year, and subsequently becomes unemployed because of a labor dispute, cannot honestly be regarded as one who is unemployed through no fault of his own. Had the party agreed to continue operations under the status quo for a significantly shorter period, leaving the door open for good faith negotiations, then naturally it would be much more difficult to find fault in that party's actions. Thus, a rule that allows the parties to continue their operations until a new agreement can be forged, but allows neither party to shackle the other to oppressive terms from which it would like to escape, avoids unemployment, effectuates the primary purpose of the unemployment compensation law, and fosters an environment of continued good faith negotiations.

D. *Employer's Actions Under the Concept of Status Quo*

In deciding which party was at fault for the work stoppage in *Bays*, the Ohio Supreme Court scrutinized the actions of both the union and Shenango.[248] Before turning to the union's offer to extend the status quo, the court analyzed Shenango's prior offer of continued employment to the union and determined that it did not represent an

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period. *Bays*, 53 Ohio St. 3d at 139, 559 N.E.2d at 746. ("'one year is not a reasonable period . . . because it would bind the Employer to the terms and conditions of the existing agreement, from which it was trying to escape, for a full year and the Union would then have little or no incentive to bargain for that period.'").

For a discussion of the argument concerning whether issues of good faith bargaining should not necessarily be of concern to courts which are adjudicating unemployment compensation cases, see *supra* note 224 and accompanying text.

247. *See supra* notes 180-82 and accompanying text.

248. *Bays*, 53 Ohio St. 3d at 135, 559 N.E.2d at 743.

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offer to maintain the status quo.[249] The court ultimately held that the union's offer was one to maintain the status quo.[250]

In his dissent, Justice Wright criticized the majority for introducing Shenango's offer to the union into its analysis.[251] Justice Wright argued that the *Vrotney* status quo test is not concerned with what the employer offers to the employees, but only with whether the employees have offered to maintain the status quo.[252] Moreover, Justice Wright asserted that such a rule is entirely consistent with Ohio's rule which places the burden of proof in an unemployment compensation case upon the party claiming unemployment compensation benefits.[253]

Pennsylvania precedent clearly supports Justice Wright's conclusion that the status quo test is only concerned with what the union offers. As Justice Wright noted, the *Vrotney* test itself asks whether the employees have offered, and whether the employer has agreed, to maintain the status quo for a reasonable time.[254] In addition, Justice Wright quoted from *Philco Corp. v. Unemployment Compensation Board of Review*,[255] in which the Pennsylvania Supreme Court stated that the union must show it first presented an offer to the employer to maintain the status quo.[256] Finally, as Justice Wright asserted, Ohio's burden of proof in an unemployment compensation case is consistent with the allocation of the burden of proof in unemployment compensation cases in Pennsylvania.[257]

By emphasizing the employer's actions in *Bays*, the majority has clouded the status quo test and has opened the door for examinations

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249. *Id.*

250. *Id.* at 136, 559 N.E.2d at 744.

251. *Id.* at 140, 559 N.E.2d at 747-48 (Wright, J., dissenting).

252. *Id.*, 559 N.E.2d at 748 (Wright, J., dissenting) (citing Vrotney Unemployment Compensation Case, 400 Pa. 440-44, 163 A.2d 91, 93 (1960)).

253. *Id.* (Wright, J., dissenting) (quoting Shannon v. Bureau of Unemployment Compensation, 155 Ohio St. 53, 97 N.E.2d 425 (1951)).

254. *Id., see also supra* note 63 and accompanying text.

255. 430 Pa. 101, 242 A.2d 454 (1968). For a discussion of this case, see *supra* notes 66-76 and accompanying text.

256. *Bays*, 53 Ohio St. 3d at 140, 559 N.E.2d at 748 (Wright, J., dissenting). In *Philco*, the Pennsylvania Supreme Court stated: "When . . . the work stoppage takes the *form* of a strike, the burden is upon the union to show that it made the initial "peace" move by offering to continue the status quo." 430 Pa. at 104, 242 A.2d at 456 (emphasis in original).

257. Justice Wright, quoting the syllabus of *Shannon*, stated: "The burden of proof is upon the claimant to establish the right to unemployment benefits under the unemployment compensation law of Ohio." *Bays*, 53 Ohio St. 3d at 140, 559 N.E.2d at 748 (Wright, J., dissenting).

In Pennsylvania, as well, the burden of proof is upon the claimant in an unemployment compensation case. *See, e.g., Bishop*, 90 Pa. Commw. 553, 557, 496 A.2d 110, 112 in which the court stated: "A claimant whose employment has been interrupted by a work stoppage arising out of a labor dispute bears the burden of proving that the stoppage resulted from a lockout." (quoting McCormick Dairy Lines v. Unemployment Compensation Bd. of Review, 74 Pa. Commw. 184, 459 A.2d 74, 76 (1983)).

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into whether an employer offers to maintain the status quo. This unfortunate result could lead to an erosion of the basic tenet that claimants bear the burden of proof in unemployment compensation cases. This, of course, would place the employer in the predicament of having to prove that it offered to maintain the status quo in order to thwart a claimant's request for benefits. Although it is difficult to predict exactly what the final effect is likely to be, by both adopting the status quo test enunciated in *Vrotney*, which requires courts to examine employees' offers to maintain the status quo, and examining the employer's offer to determine whether there was a lockout, the *Bays* court has sent mixed signals which will create uncertainty in the area of unemployment compensation law for some time to come.

IV. CONCLUSION

The court in *Bays* validated the status quo test for determining whether a work stoppage is due to a lockout under the labor dispute disqualification provision of the Ohio Unemployment Compensation Act. Although the court correctly stated the status quo test and appropriately sanctioned its adoption in Ohio, the court ignored Pennsylvania case law regarding issues that were decided in the very state that created the status quo test. The court rendered its decision without any explanation of why the issues necessitated opposite conclusions in Ohio. The court's misinterpretation of the status quo concept will yield uncertainty within the area of unemployment compensation law which will translate into more litigation over issues within this area of the law. Pennsylvania case law regarding the status quo test provides a wealth of precedent. It is quite conceivable, however, that Ohio courts will often be compelled to choose a new course to fit the needs of Ohio. In doing so, better explanations for decisions breaking from Pennsylvania precedent would provide a great service to the legal community as such explanations would account for greater certainty in the area of unemployment compensation law.

Adam Seth Levy

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